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In the Supreme Court of the United States

October Term, 1957

No. [illegible]

[illegible]

v.

THOMAS S. GATES, Secretary of the Navy, and WILBER M. BRUCKER, Secretary of the Army

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 932

WESLEY D. WHITE, ET AL., PETITIONERS,

v.

THOMAS S. GATES, JR., SECRETARY OF THE NAVY* AND WILBER M. BRUCKER, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 1a) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 2a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1958. The petition for a writ of certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* On October 1, 1957, the court below entered an order substituting as appellee Thomas S. Gates, Jr., who succeeded Charles S. Thomas as Secretary of the Navy while petitioners' appeal was pending.

QUESTIONS PRESENTED

1. Whether a contention that the Veterans Preference Act is an unconstitutional discrimination against non-veterans presents a substantial question warranting the convening of a three-judge court.

2. Whether petitioners have standing to challenge the Veterans Preference Act on the ground that it violates the constitutional principle of separation of functions by limiting the President's power to control the appointment and dismissal of executive personnel.

STATUTE INVOLVED

Section 12 of the Veterans Preference Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *

STATEMENT

These are actions by non-veteran employees of the Department of the Navy, and non-veterans formerly employed by the Department of the Army, to enjoin the operation of the Veterans Preference Act, Section 12, 58 Stat. 390, 5 U.S.C. 861, on the ground that it is unconstitutional.

Five of the petitioners are presently employed at the Charleston Naval Shipyard. Of this number, only one, Doctor R. Winter, has undergone a change in employment status as a result of the operation of the Veterans Preference Act.[1]

Petitioner George R. Phillips is now employed as an Optical Instrument Maker at the New York Naval Shipyard. He formerly held a position as Planner and Estimator (Optical Instrument Maker) at a higher salary, but he was obliged to take his present position after he received a reduction-in-force notice of separation on February 24, 1956 (R. 27). No claim is made that any veterans preference eligibles enjoyed priority over him on the retention register for his former position.

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[1] On April 3, 1956, petitioner Winter was notified that he would be separated from his employment as Leadingman Shipfitter on July 2, 1956. Fifteen other employees preceded him on the retention register because they were veterans preference eligibles. By exercising "bumping rights", he obtained a position as Shipfitter at a lower salary (R. 23-24).

Of the other petitioners employed at the Charleston Naval Shipyard, Herbert B. Hammond, James Williams and Christopher Wright received notices of reduction in force which were cancelled shortly after issuance (R. 25, 26); and Wesley D. White has never had his employment status questioned by reduction-in-force proceedings which might subordinate him to veterans preference eligibles (R. 28).

Petitioners Joseph A. Murray and Edgar W. Pitts were employed at the Army Springfield Armory, Springfield, Massachusetts. Both were separated from their employment on April 27, 1956, as the result of a reduction in force in which veterans preference eligibles of lesser seniority were retained in similar positions (R. 13, 15, 16).

In February and May, 1956, the petitioners employed in the Charleston and New York Naval Shipyards filed complaints (R. 1, 5, 14, 17) alleging, in substance, (1) that the Secretary of the Navy had directed that non-veterans be subordinated to veterans preference eligibles in reductions in force at the installations where they were employed; (2) that petitioners were threatened with irreparable injury thereby, and (3) that the Veterans Preference Act results in unconstitutional discrimination against them. They sought injunctive relief restraining the Secretary from dismissing them under priorities established by the Veterans Preference Act and, where necessary, orders directing reinstatement to their former positions.

On May 4, 1956, the petitioners who were former employees of the Springfield Armory filed similar complaints against the Secretary of the Army (R. 12), alleging that they had been dismissed while veterans of lesser seniority were retained, and attacking the constitutionality of the Veterans Preference Act. These petitioners likewise sought reinstatement to their positions and an injunction against future dismissal under the Veterans Preference Act.

After filing its answer, the Government moved for summary judgment on the grounds (1) that the complaints failed to state a claim upon which relief could be granted and (2) that petitioners White, Hammond,

Williams and Wright lacked standing since their employment status had not been affected by the operation of the Act. Treating the complaints as an application for the convening of a three-judge court, the District Court held that no substantial question existed as to the constitutionality of the Veterans Preference Act. Accordingly, it dismissed the complaints (Pet. App. 1a, 4. 30-31). The Court of Appeals for the District of Columbia affirmed, Prettyman, J., dissenting (Pet. App. 2a-7a).

ARGUMENT

Both courts below have correctly determined that petitioners' complaints presented no substantial constitutional question and that there was therefore no occasion for convening a three-judge district court. *California Water Service Co.* v. *Redding*, 304 U.S. 252. The lack of substance in petitioners' claim that the Veterans Preference Act unconstitutionally discriminates against them is indicated by prior rulings of this Court and by the long history of veterans preference, which has been part of the federal civil employment system for almost a century. There is also an equal lack of merit to the contention that the Act unconstitutionally limits the powers of the President to appoint and dismiss executive personnel. The Congressional power to control the removal of subordinate employees, such as petitioners, is well established. Further, petitioners point to no presidential directive conferring any rights upon them which conflicts with the Veterans Preference Act; indeed, as it applies to their positions, the President has acquiesced in the operation of the Act.

1. No substantial constitutional question is presented by petitioners' contention that the Veterans Preference

Act unreasonably discriminates against non-veteran employees of the federal Government. In *Gianatasio* v. *Kaplan, et al.*, 284 U.S. 595, this Court dismissed, for want of a substantial federal question, an appeal from a decision by the New York Court of Appeals sustaining the constitutionality of New York's veterans preference law against the contention that it violated the equal protection clause of the Fourteenth Amendment (257 N.Y. 531, 178 N.E. 782). We submit that the disposition of that case is equally dispositive of this case.[2]

Moreover, as the court below noted (Pet. App. 2a), this Court has enforced the Veterans Preference Act in circumstances parallel to those here presented, without any suggestion of constitutional difficulty. In *Hilton* v. *Sullivan*, 334 U.S. 323, the Court had before it the question as to whether (p. 325): "In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to non-veterans, even though the nonveterans have served the Government a substantially longer time than the veterans." In answering this question in the affirma-

[2] Petitioners argument that *Gianatasio* should be read in the light of *Barthelmess* v. *Cukor*, 231 N.Y. 435, 132 N.E. 140, misinterprets the latter case. *Barthelmess* was concerned with sections of the New York Constitution which restricted preference to Civil War veterans. Today, New York, like many other states, has a general veterans preference section in its Constitution. N.Y. Const. Art. 5, § 6. Similarly, *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701, quoted in part by petitioners, recognizes that preference for veterans possessing the necessary qualifications is valid under the state constitution's prohibition against special privileges. State cases such as *Barthelmess* and *Schmid* must be read in the light of the particular provisions of the state constitution which they interpret. See Annotation, *Constitutionality of State Veterans' Public Employment Preference Laws*, 161 A.L.R. 494.

tive, the Court reviewed and accepted the long history of federal veterans preference legislation.

That history discloses that preference for veterans in federal employment is a national policy dignified by ninety-two years of usage. Its earliest form dates back to the administration of President Lincoln and it has since developed as an integral part of the merit system. The Civil Service Act of 1883, 22 Stat. 403, which created the modern civil service, reaffirmed in Section 7 the legislative policy of granting employment preference to honorably discharged veterans. The day before the enactment of the Lloyd-LaFollette Act (Act of August 24, 1912, Section 6, 37 Stat. 555), Congress extended the preference accorded veterans. Act of August 23, 1912, § 4, 37 Stat. 360, 413.[3]

Thus, veterans preference is a traditional element in federal civil service policy. It represents the considered and consistent judgment of the Congress that military service to the Republic, especially in time of emergency, deserves special recognition. That judgment has been periodically reviewed by the Congress and veterans employment preference has been reenacted or left undisturbed, after each review, as a suitable civil service policy. The Veterans Preference Act of 1944 is the latest expression of that policy.

Petitioners' contention that the 1944 Act is not the best means of promoting the efficiency of the civil

[3] To this must be added the long line of authority developed in the Court of Appeals for the District of Columbia Circuit, which, by virtue of its location at the seat of Government, has been preeminent in the vindication of veterans employment rights. See, *e.g.*, *Reynolds* v. *Lovett*, 91 App. D.C. 276, 201 F. 2d 181, certiorari denied, *sub nom. Wilson* v. *Reynolds*, 345 U.S. 926; *Hilton* v. *Forrestal*, 83 App. D.C. 44, 165 F. 2d 251, affirmed *sub nom. Hilton* v. *Sullivan*, 334 U.S. 323.

service misconceives the nature of the issue in the courts. The question here is not whether the courts approve the wisdom of the policy Congress has adopted, but whether a substantial constitutional objection can be raised against the power of Congress to adopt that policy. So long as the classification which it has made bears a reasonable relation to the purposes of the legislation, Congress has the broadest discretion to make statutory classifications. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *Currin* v. *Wallace*, 306 U.S. 1, 13-14; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585.

Congress cannot, of course, adopt a test forbidden by the Constitution as a standard for public employment. Thus, an employee cannot be discharged for religious reasons (Const., Art. VI, Cl. 3), or for reasons of race. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. But within such limitations Congress and the President have the widest possible latitude to establish standards for the selection and retention of employees. Certainly, the award of veterans preference cannot be compared to the patently arbitrary discrimination condemned in *Wieman* v. *Updegraff*, 344 U.S. 183.

In any event, even if the matter of competence were a proper subject for judicial inquiry, the Veterans Preference Act does not create classifications which permit incompetent veterans to be retained in preference to skilled non-veterans. By the terms of the Act, only veterans with ratings of "good" or better are entitled to preference.[4] In the estimate of Con-

[4] A rating of "satisfactory" corresponds at least to a rating of "good" under the Veterans Preference Act. Performance Rating Act of 1950, § 6, 5 U.S.C. 2005, 64 Stat. 1099. Veterans with ratings below good are given preference only with respect to competing non-veteran employees who have equal or lower efficiency ratings.

gress, qualified veterans, as a group, have performed outstanding public service, and are so entitled to employment preference. This is clearly a rational criterion within the wide range of choice afforded Congress by the Constitution.

2. The Veterans Preference Act does not infringe upon the power of the President to control the appointment and removal of Executive personnel. Petitioners are not officers appointed by the President but are subordinate employees whose appointment may be controlled by Congress. The Constitution (Art. II, § 2, Cl. 2) expressly vests power in the Congress to control the appointment of such subordinate employees. In *United States* v. *Perkins*, 116 U.S. 483, 485, this Court said with reference to that provision: "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." And, in *Myers* v. *United States*, 272 U.S. 52, 161, the Court said that it had "recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." If there be instances, involving positions unlike petitioners', to which this principle of the *Perkins* and *Myers* cases would not apply, this is obviously not such a case.

In any event, petitioners are in no position to invoke the President's powers over Executive personnel. They can point to no order, directive, or regulation promul-

gated by the President which confers rights upon them that conflict in any way with the mandate of Congress. On the contrary, whatever the result might be if the President were to assert his individual power against Congress, he has here acquiesced in the statutory limitation of the Veterans Preference Act. See *Cole* v. *Young*, 351 U.S. 536, 557, fn. 20.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HOWARD S. SHAPIRO,
Attorneys.

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